84-1870 (1)

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ALEXANDER L. STEVAS,
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

LOUIE L. WAINWRIGHT; and
THE ATTORNEY GENERAL OF
THE STATE OF FLORIDA,
JIM SMITH,

Petitioners,

vs.

EDWARD JAMES THOMAS,

Respondent.

Petition for Writ of Certiorari
to the United States
Court of Appeals for the
Eleventh Circuit

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
Assistant Attorney General
The Capitol
Tallahassee, Florida 32301
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COUNSEL OF RECORD

53pp

QUESTION PRESENTED

WHETHER A FEDERAL HABEAS CORPUS PETITION SHOULD HAVE BEEN DISMISSED WITHOUT PREJUDICE TO ALLOW A STATE PRISONER TO EXHAUST STATE REMEDIES WHEN THE INMATE'S FIRST STATE COLLATERAL ATTACK HAD ALREADY BEEN DENIED BECAUSE OF PROCEDURAL DEFAULT AND UNDER ENGLE V. ISAAC, 456 U.S. 107, 125, n. 28 (1982), EXHAUSTION WOULD BE A FUTILITY BECAUSE STATE LAW RESTRICTS SUBSEQUENT COLLATERAL ATTACKS?

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OPINIONS BELOW

The per curiam opinion of the Eleventh Circuit Court of Appeals upon which review is sought is unreported (A-27). That opinion affirmed an unpublished order of the United States District Court for the Middle District of Florida which had denied Respondent's Petition for Writ of Habeas Corpus (A-23). The decision of Florida's First District Court of Appeal which had affirmed without opinion the trial court's denial of Respondent's Motion for Post Conviction Relief is reported at Thomas v. State, 437 So.2d 679 (Fla. 1st DCA 1983). The trial court's order which denied Respondent's Motion for Post Conviction Relief is unreported (A-28).

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was rendered on March 25, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

APPENDIX

Petitioner has included in the appendix to this petition the Eleventh Circuit's per curiam decision without opinion upon which review is sought, the federal district court's order which adopted in full the magistrate's report and recommendation, the magistrate's report and recommendation, Petitioner's objections to the report and recommendation, the trial court's order which denied Respondent's motion for post conviction relief because of procedural default, and the order of Florida's First District

Court of Appeal which had affirmed without opinion the trial court's denial of the motion for post conviction relief. Other portions of the record are available should the Court request them.

STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

After a jury trial in Clay County, Florida, Respondent was found guilty of two counts of burglary and three counts of grand theft. Both burglary judgments and two of the three grand theft judgments and sentences were affirmed by Florida's First District Court of Appeal. Thomas v. State, 405 So.2d 1015 (Fla. 1st DCA 1981). Respondent then filed a motion for post conviction relief in the trial court in which he raised two grounds: (1) an alleged denial of due process because the State

had allegedly failed to establish a proper chain of custody of a piece of evidence, and (2) denial of effective assistance of counsel because the trial court had allegedly had an extraneous conversation with a witness. The motion was denied by the trial court which found that these issues could have been and should have been raised on direct appeal (A 28). The trial court's order was affirmed without opinion in a per curiam decision by the First District Court of Appeal. Thomas v. State, 437 So.2d 678 (Fla. 1st DCA 1983) (A 30).

Respondent then filed two petitions for writ of habeas corpus in the Middle District of Florida. Petitioners Louie Wainwright and Jim Smith filed a motion for summary judgment in which it was alleged that both of the consolidated

petitions should be dismissed with prejudice because of procedural default in the state courts pursuant to Engle v. Isaac, 456 U.S. 107 (1982). As to the two claims which Respondent had attempted to raise in his motion for post conviction relief which had been filed in the trial court, the magistrate recommended that they be dismissed with prejudice because of procedural default under Engle. However, concerning three new claims which had never been raised or attempted to have been raised in the state courts, the magistrate found that Respondent had not exhausted these claims and that he should be given an opportunity to raise them in the state courts. See Report and Recommendation at 4 (A-8).

Petitioners then filed objections to the report and recommendation and contended generally that the magistrate had misconstrued this Court's holding in Engle v. Isaac and that both petitions should have been dismissed with prejudice because there were no available remedies left in the state courts for Respondent to exhaust. See Objections to Magistrate's Report and Recommendation at 2, 3 (A-17, 18). The federal district court adopted the magistrate's report and recommendation in full (A-23). Petitioners then appealed to the Eleventh Circuit Court of Appeals which affirmed without opinion the district court's order (A-27). Petitioners then sought discretionary review in this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

CERTIORARI SHOULD BE GRANTED TO REVERSE THE COURT OF APPEALS WHICH HAD AFFIRMED THE DISTRICT COURT'S DENIAL OF HABEAS RELIEF WITHOUT PREJUDICE FOR RESPONDENT TO RETURN TO THE STATE COURTS TO EXHAUST STATE REMEDIES DESPITE THE FACT THAT EXHAUSTION WOULD BE A FUTILITY BECAUSE UNDER FLORIDA LAW STATE REMEDIES ARE NO LONGER AVAILABLE.

This case presents an opportunity for the Court to clarify what it meant in Engle v. Isaac, 456 U.S. 107, 125, n. 28 (1982), when it explained that there was a difference between the procedural default doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977) and the exhaustion doctrine of 28 U.S.C. §2254(b). Petitioners understood Engle to stand for the principle that the procedural default doctrine should be

applied regardless of whether a federal habeas petitioner has ever presented his claims to the state courts as long as state law precluded such presentation in future collateral proceedings.

However, the Eleventh Circuit has rejected Petitioners' interpretation and clearly stated that the procedural default doctrine of Wainwright v. Sykes does not apply unless the state courts have been given an opportunity to rule on the federal claims regardless of when such claims are first raised on federal habeas corpus and regardless of the number of collateral attacks allowed under state law. In Campbell v. Wainwright, 738 F.2d 1573, 1577, n. 3 (11th Cir. 1984), the court noted that representatives of the State of Florida

apparently did not understand the difference between exhaustion and waiver:

> Failure to exhaust arises when a petitioner files a habeas proceeding raising claims never presented to a state court, see generally Rose v. Lundy, 455 U.S. 509 (1982); the procedural bar of Wainwright applies when the state refuses to consider an issue because of a procedural default. Thus, if the petitioner has never presented an issue to the state courts, Wainwright does not control. The action required of a federal court is vastly different in the two situations. (Emphasis in original.)

It is the position of the State of Florida that this statement in Campbell, as well as what occurred in Respondent's case, is in direct conflict with what the Court said and meant in Engle. It should be recognized that Ohio's law,

which was construed in Engle, did not allow collateral review of convictions on claims which could have been litigated prior to judgment or on direct appeal. Florida's law in that regard is identical. Florida Rule of Criminal Procedure 3.850 has been construed by the Florida Supreme Court to preclude the raising of claims on collateral attack which could have been raised on direct appeal. Respondent's situation is especially egregious in that his first collateral attack was denied because of procedural default. Yet, if the Eleventh Circuit is correct, Respondent will be placed back on the "habeas corpus merry-go-round," which was condemned in Rose v. Lundy, supra, (Stevens, J., dissenting). Moreover,

the Court should not lose sight that it is not only state prisoners who will be forced on the merry-go-round, but also it is representatives of the State of Florida, trial judges, appellate judges, and federal courts which will be forced to relitigate issues which should have been disposed of in Respondent's initial habeas petition.

The Court should also be aware that Florida's law on subsequent collateral attacks is even more strict than it is for initial motions for post conviction relief. See Smith v. State, 453 So.2d 388, 389 (Fla. 1984), in which the Florida Supreme Court upheld the trial court's dismissal of a subsequent post conviction motion because the issues could have been and should have been raised in the earlier motion--the

Florida Supreme Court stated that the defendant's attempt to raise new claims in the second motion constituted "an abuse of the post-conviction process." Id. See also Ford v. Wainwright, 451 So.2d 471, 474 (Fla. 1984).

Of course, as in Engle, it must be presumed that the trial court would follow the Florida Supreme Court's binding law pertaining to subsequent motions for post conviction relief. Therefore, under Florida law there is no remedy available and the issues which have never been raised in the state courts should have been found to have been exhausted for federal habeas corpus purposes. Since Respondent totally failed to demonstrate the requisite cause and prejudice under the Sykes-Engle doctrine, the federal district

court should have dismissed both petitions with prejudice.

CONCLUSION

Engle v. Isaac makes it clear that in states like Florida in which a prisoner is precluded from filing a collateral attack which raises an issue which either was or could have been raised on direct appeal or on an initial collateral attack, there are no state remedies available. Since no state remedies are available, such prisoners are considered to have exhausted their state remedies for federal habeas purposes pursuant to 28 U.S.C. §2254(b). It is Petitioners' position that since Respondent's first collateral attack has already been dismissed because of procedural default, it would be a futile gesture to force Respondent to return to the

state courts only to have subsequent collateral attacks dismissed for the same reasons.

If Engle v. Isaac stands for the principle that procedural default should have been applied in this case rather than exhaustion, summary vacation in light of Engle v. Isaac is appropriate. However, if Engle means something else, Petitioners respectfully request the Court to grant certiorari to resolve the ambiguity between footnote 28 in Engle and the Eleventh Circuit's practice of applying exhaustion rather than the waiver doctrine of Wainwright v. Sykes.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD JAMES THOMAS,

Petitioner,

vs. CASE NO. 83-1156-Civ-J-12
CASE NO. 83-1157-Civ-J-12

LOUIE L. WAINWRIGHT; and
THE ATTORNEY GENERAL OF THE
STATE OF FLORIDA, JIM SMITH,

Respondents.

REPORT AND RECOMMENDATION

STATUS

Petitioner, a state inmate, instituted this action pursuant to 28 U.S.C. § 2254 by filing two Petitions seeking a Writ of Habeas Corpus. By Order of the undersigned, the two cases were consolidated. In Case No. 83-1156-Civ-J-12, Petitioner alleges the following grounds:

1. Because the State failed to properly establish chain of custody for a piece of physical evidence, Petitioner was denied his right to a fair and impartial trial and due process of law; and

2. Petitioner was denied effective assistance of counsel because voir dire of a State witness, who had an ex parte conversation with the judge, was not permitted.

The Petition in Case No. 83-1157-Civ-J-12 contains these grounds for relief:

1. Petitioner was denied his Sixth Amendment right to cross-examine a witness against him; and

2. One of the State's witnesses committed perjury at Petitioner's trial.

Respondents have moved for summary judgment in both cases.

FINDINGS OF FACT

After a jury trial, Petitioner was found guilty of two counts of burglary and three counts of grand theft. Petitioner raised only two issues on his direct appeal. First, he claimed that the trial court had erred by denying his motion for discharge under Florida's speedy trial rule. Second, he claimed that the trial court had erred when it imposed separate consecutive sentences for the two counts of grand theft that had occurred in the same burglary. Neither of these claims are raised in Petitioner's habeas actions. The First District Court of Appeal affirmed both burglary judgments and sentences, and two of the three grand theft judgments

and sentences. Thomas v. Florida, 405 So.2d 1015 (Fla. 1st DCA 1981).

Petitioner then filed a motion for post-conviction relief in the trial court. He alleged two relevant grounds for relief: (1) a denial of due process because the State allegedly failed to establish a proper chain of custody of a piece of evidence, and (2) denial of effective assistance of counsel because the trial court had had an extraneous conversation with a witness. These two grounds are raised in Case No. 83-1156-Civ-J-12. The trial court denied the motion without a hearing. In its Order Denying Motion for Post-Conviction Relief, the trial court specifically found that the issues raised in the motion for post-conviction relief either "were or could have been raised"

on the direct appeal which had already been taken to the First District. Petitioner appealed to the First District, and that court affirmed the trial court's ruling in a per curiam order without opinion.

It is clear from the foregoing that Petitioner has never raised the two claims in Case No. 83-1157-Civ-J-12, and the State courts have not yet had the opportunity to consider them.

CONCLUSIONS OF LAW

A. EXHAUSTION

The only basis for this Court to grant a state prisoner habeas corpus relief is if he ". . . is in custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2254(a). However, before this Court can entertain a State prisoner's

petition for such a Writ, available State remedies must be exhausted. 28 U.S.C. § 2254(b). This is true in cases where all of the claims have not been exhausted, Walker v. Zant, 693 F.2d 1087 (11th Cir. 1982); Bufalino v. Reno, 613 F.2d 568 (5th Cir. 1980), as well as in mixed petitions where not all, but only some of the claims presented have been exhausted. Rose v. Lundy, 455 U.S. 509 (1982); Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc).

As stated by the Supreme Court in Anderson v. Harless, 459 U.S. 4, 6 (1982):

> In Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971), we made clear that 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to apply

controlling legal principles to the facts bearing upon his constitutional claim. Id., at 276-277, 92 S.Ct., at 512-513. It is not enough that all the facts necessary to support the federal claim were before the state courts, id., at 277, 92 S.Ct., at 513, or that a somewhat similar state-law claim was made. See, e.g., Gayle v. LeFevre, 613 F.2d 21 (CA2 1980); Paullet v. Howard, 634 F.2d 117, 119-120 (CA3 1980); Wilks v. Israel, 627 F.2d 32, 37-38 (CA7), cert. denied, 449 U.S. 1086, 101 S.Ct. 874, 66 L.Ed.2d 811 (1980); Connor v. Auger, 595 F.2d 407, 413 (CA8), cert. denied, 444 U.S. 851, 100 S.Ct. 104, 62 L.Ed.2d 67 (1979). In addition, the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. Picard, supra, 404 U.S. at 275, 277-278, 92 S.Ct. at 512, 513-514. See also, Rose v. Lundy, ___ U.S. ___, ___, 102 S.Ct. 1198,

1204, 71 L.Ed.2d 379 (1982).

The State of Florida must be given an opportunity to consider Petitioner's legal theory of a federal constitutional deficiency because it can provide a remedy. Winfrey v. Maggio, 664 F.2d 550 (5th Cir. 1981); Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981) (en banc); Hart v. Estelle, 634 F.2d 987 (5th Cir. 1981); Leonard v. Wainwright, 601 F.2d 807 (5th Cir. 1979). Adams v. Wainwright, 445 F.2d 832 (5th Cir.), cert. denied, 404 U.S. 860 (1971).

State remedies for the claims raised in Case No. 83-1157-Civ-J-12 have not been exhausted. These issues should therefore be dismissed without prejudice.

B. PRECLUSION

In Case No. 83-1156-Civ-J-12, Petitioner raised the same two grounds asserted in his Motion for Post-Conviction Relief.

In Wainwright v. Sykes, 433 U.S. 72 (1977), the Supreme Court held that a federal habeas corpus petitioner, who cannot obtain direct review of his conviction in state court because of a failure to comply with state procedural requirement that a defendant make a contemporaneous objection to the admissibility of evidence, also forfeits the right to federal habeas corpus relief unless he can show cause and prejudice. See McKinney v. Estelle, 657 F.2d 740 (5th Cir. 1981), cert. denied, 102 S.Ct. 1994 (1982); Huffman v. Wainwright, 651 F.2d 347 (5th Cir.

1981); Washington v. Estelle, 648 F.2d 276 (5th Cir.), cert. denied, 454 U.S. 899 (1981); Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981), (on rehearing), cert. denied, 102 S.Ct. 1992 (1982).

But failure to comply with the contemporaneous objection rule is not the only way a criminal defendant in Florida may be barred by the procedural default rule. Under Florida law, when a criminal defendant fails to raise an issue that could have been asserted on direct appeal, the issue may not be considered in a motion for post-conviction relief under Rule 3.850, Florida Rules of Criminal Procedure. Ford v. Estelle, 407 So.2d 907 (Fla. 1981); Hargrave v. Florida, 396 So.2d 1127 (Fla. 1981); Graham v. Florida,

372 So.2d 1363 (Fla. 1979); Spinkelink v. Florida, 350 So.2d 85 (Fla.), cert. denied, 434 U.S. 960 (1977); Florida v. Matera, 266 So.2d 661 (Fla. 1972); Watkins v. Florida, 413 So.2d 1275 (Fla. 1st DCA 1982); Lazarus v. Florida, 412 So.2d 54 (Fla. 5th DCA 1982); Harvey v. Florida, 383 So.2d 770 (Fla. 3rd DCA 1980); Wood v. Florida, 375 So.2d 10 (Fla. 1st DCA 1979) (on rehearing); Williams v. Florida, 371 So.2d 110 (1st DCA 1978), cert. denied, 373 So.2d 462 (Fla. 1979). Such issues are facially insufficient to support Rule 3.850 relief as a matter of law. Thompson v. Florida, 410 So.2d 500 (Fla. 1982); Evans v. Florida, 393 So.2d 80 (Fla. DCA 1981); Edwards v. Florida, 364 So. 2d 119 (Fla. 1st DCA 1978); McGriff v. Florida, 259 So.2d 508 (3d DCA), cert.

denied, 263 So.2d 829 (Fla. 1972).

As stated in Huffman:

> A defendant's failure to comply with established state procedures can cause him to waive his right to complain about a constitutional violation. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The state can restrict the time within which the constitutional attack must be made, after which the defendant will be deemed as a matter of law to have waived his right to attack the defect . . . .
>
> 651 F.2d at 349.

Thus, the procedural default rule also applies to claims defendants fail to include in direct appeals in compliance with state procedural requirements. Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977); Forman v. Smith, 633 F.2d 634 (2d Cir. 1980), cert. denied, 450 U.S.

1001 (1981).

Because the State court properly refused to consider the issue waived on direct appeal, Sykes bars consideration of the merits by this Court unless cause and prejudice are shown. Neither has been alleged nor proven. The Court notes, without ruling on Petitioner's claim of ineffective assistance of counsel, that such a claim cannot constitute cause. Washington v. Estelle, supra; Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir.), cert. denied, 434 U.S. 957 (1977).

RECOMMENDATION[1]

The Petition in Case No. 83-1156-Civ-J-12 be DISMISSED with prejudice.

---

1 Objections may be filed in accordance with 28 U.S.C. §636, and Local Rule 6.02 ten (10) days after service of this document. Failure to do so shall bar the party from a de novo determination by a district judge and from attacking factual findings on appeal.

The Petition in Case No. 83-1157-Civ-J-12 be DISMISSED without prejudice.

DONE AND ENTERED at Jacksonville, Florida, this 17th day of May, 1984.

HARVEY E. SCHLESINGER
United States Magistrate

Copies to:

The Honorable Howell W. Melton

Mr. Edward James Thomas
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Union Correctional Institution
Post Office Box 221
Raiford, FL 32083

Mr. Lawrence A. Kaden
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD JAMES THOMAS,

Petitioner,

vs. Case No. 83-1156-Civ-J-12
83-1157-Civ-J-12

LOUIE L. WAINWRIGHT; and
THE ATTORNEY GENERAL OF THE
STATE OF FLORIDA, JIM SMITH,

Respondents.

OBJECTIONS TO MAGISTRATE'S
REPORT AND RECOMMENDATION

Comes now Respondents, represented by the undersigned counsel, and pursuant to local rule 6.02 and 28 U.S.C. §636 file these Objections to the Magistrate's Report and Recommendation which was received by counsel for Respondent on May 18, 1984.

The magistrate correctly found that of the four issues being raised on federal habeas corpus, none of them have

ever been considered on their merits by the state courts. The magistrate also correctly found that Petitioner had attempted to raise two of the four issues in a Motion for Post-Conviction Relief which had been filed in the trial court. Concerning those two issues, the magistrate correctly found that Petitioner's claims were barred on federal habeas review because the state courts had found Petitioner in procedural default and because Petitioner had failed to demonstrate cause and prejudice which would excuse that default in federal court. See Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Respondents have no objections concerning that portion of the

magistrate's report and recommendation.

However, the magistrate then found that because Petitioner had not raised the other two issues (a proper chain of custody and an alleged denial of effective assistance of counsel because the trial court had had an extraneous conversation with a witness) Petitioner had not exhausted those claims.

It is well settled that a federal habeas petition must be dismissed for exhaustion if the particular state has a method or procedure which would allow the unexhausted claims to be raised. However, in Engle v. Isaac, supra, at 456 U.S. 126, 71 L.Ed.2d 799, n. 28, the majority of the United States Supreme Court clearly stated that "the problem of waiver is separate from the question whether a state prisoner has

exhausted state remedies." The court went on to explain that exhaustion was required only if remedies were still available in the state courts. Since Ohio, like Florida, has limited collateral review and because prisoners in Ohio could not raise claims on collateral attack which could have been litigated before judgment or direct appeal, the court then found "that state collateral relief is unavailable to respondents and, therefore, that they have exhausted their state remedies with respect to this claim." Id.

Thus, it is clear from Engle that in states having rules of procedure like Fla.R.Crim.P. 3.850 which prohibits matters from being raised on collateral attack which could have been raised on direct appeal, there are no

available state remedies and dismissal of a federal habeas petition for exhaustion is erroneous. This should be especially true in cases like Petitioner's where the state courts have already refused to consider Petitioner's first collateral attack on its merits because of Petitioner's procedural defaults. If the magistrate's reasonings were correct, then every time a petitioner raised a new claim in federal court which had not been previously raised in state court, exhaustion would always be required even though the filing of a collateral attack would not be considered on its merits in state court because the particular issue could have been raised on direct appeal. This would, in effect, be the habeas corpus merry-go-round condemned in prior United States Supreme Court

cases.

In any event, it is clear that Petitioner did not raise any of the claims in state court which he is now attempting to raise in federal court. Because all four of his claims could have been raised on direct appeal, there is nothing left to exhaust, and the procedural default doctrine of Sykes and Engle should be controlling. See Ford v. Wainwright, ___ So.2d ___ (Fla., slip opinion filed May 25, 1984), in which the Florida Supreme Court just today reiterated that issues which were not raised in a first motion for post-conviction relief could not be raised in a subsequent motion for post-conviction relief. Since Petitioner, like the petitioner in Ford, can not raise new issues in a subsequent

collateral attack, waiver under the Sykes-Engle doctrine, rather than exhaustion, is appropriate.

WHEREFORE, Respondents respectfully request that the Court overrule the magistrate's report and recommendation to the extent that it would have dismissed Petitioner's case without prejudice to allow Petitioner to exhaust state remedies.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
Assistant Attorney General

The Capitol
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(904) 488-0600

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Magistrate's Report and Recommendation has been forwarded to Mr. Edward James Thomas, No. 044078, Union Correctional Institution, P. O. Box 221, Raiford, FL 32083, this 25th day of May, 1983.

_____

Of Counsel

COUNSEL FOR RESPONDENTS

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD JAMES THOMAS,

Petitioner,

v. Case No. 83-1156-Civ-J-12
Case No. 83-1157-Civ-J-12

LOUIE L. WAINWRIGHT; and
THE ATTORNEY GENERAL OF THE
STATE OF FLORIDA, JIM SMITH,

Respondents.

O R D E R

This cause is before the Court on two petitions for writ of habeas corpus, both filed on December 9, 1983, by petitioner Edward James Thomas, pursuant to 28 U.S.C. § 2254 (1982).

This matter was considered by the United States Magistrate, pursuant to standing order concerning assignment of state prisoner habeas corpus actions.

The Magistrate entered an order on December 20, 1983, consolidating Case Nos. 83-1156-Civ-J-12 and 83-1157-Civ-J-12. On May 17, 1984, the Magistrate filed a Report and Recommendation, recommending that Case No. 83-1156-Civ-J-12 be dismissed with prejudice. The Magistrate further recommended that Case No. 83-1157-Civ-J-12 be dismissed without prejudice in order to allow petitioner the opportunity to exhaust his state remedies. Respondents and petitioner filed written objections to the Report and Recommendation on May 29, 1984, and May 30, 1984, respectfully.

Upon consideration of the Report and Recommendation of the Magistrate and the written objections filed thereto by respondents and petitioner, and upon this Court's de novo review of the

entire file, it is

ADJUDGED:

1. That petitioner's objections to the Magistrate's Report and Recommendation are hereby overruled;

2. That respondents' objections to the Magistrate's Report and Recommendation are hereby overruled;

3. That the Magistrate's Report and Recommendation is hereby adopted, confirmed, and made a part hereof;

4. That the Petition for Writ of Habeas Corpus in Case No. 83-1156-Civ-J-12 is hereby denied with prejudice;

5. That the Petition for Writ of Habeas Corpus in Case No. 82-1157-Civ-J-12 is hereby denied without prejudice;

6. That the Clerk shall enter Judgment dismissing with prejudice the petition in Case No. 83-1156-Civ-J-12; and

7. That the Clerk shall enter Judgment dismissing without prejudice the petition in Case No. 83-1157-Civ-J-12.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 29th day of June 1984.

UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record
Edward James Thomas

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3514
Non-Argument Calendar

D.C. Docket No. 83-1157

EDWARD JAMES THOMAS,

Petitioner-Appellee,

versus

LOUIE L. WAINWRIGHT and
JIM SMITH, Attorney General,

Respondents-Appellants.

Appeal from the
United States District Court
for the Middle District of Florida

(March 25, 1985)

Before TJOFLAT, HILL and ANDERSON,
Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR CLAY COUNTY, FLORIDA.

CASE NO. 80-29-CF
80-23-CF

STATE OF FLORIDA

vs.

EDWARD JAMES THOMAS,

Defendant.

ORDER DENYING MOTION FOR POST CONVICTION RELIEF

The defendant herein having filed a "Motion for Post Conviction Relief" in proper person and the Court, having reviewed the Court files, finds that an appeal was heretofore taken which was returned affirmed; and the Court further finds that the issues raised in this motion were or could have been raised at the hearing in this cause. Upon

consideration thereof, it is

ORDERED that the defendant's "Motion for Post Conviction Relief" be and the same is hereby denied.

Green Cove Springs, Florida, June 3, 1983.

_____
CIRCUIT JUDGE

Copies furnished to:

John M. Jones, Esquire
Assistant State Attorney

Edward James Thomas #044078
Post Office Box 221
Raiford, Florida 32083

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

EDWARD JAMES THOMAS,	)	NOT FINAL UNTIL TIME EXPIRES TO
Appellant,	)	FILE REHEARING MOTION AND
vs.	)	DISPOSITION THEREOF IF
STATE OF FLORIDA,	)	FILED.
Appellee.	)	CASE NO. AT-225

Opinion filed September 26, 1983.

An Appeal from the Circuit Court for Clay County. Lamar Winegeart, Jr., Judge.

Pro Se, for Appellant.

Jim Smith, Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

ERVIN, C.J., BOOTH and THOMPSON, JJ., CONCUR.

EDITOR'S NOTE

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ORIGINAL

Supreme Court, U.S.
FILED
JUL 10 1985
ALEXANDER L. STEVAS
CLERK

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AUG 9 1985

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.

PETITIONER

v.

Case No. 84-1870

EDWARD JAMES THOMAS, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Edward James Thomas, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Respondent has previously been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. Respondent's affidavit in support of this motion is attached hereto.

Edward James Thomas
EDWARD JAMES THOMAS, Respondent

AFFIDAVIT

I, Edward James Thomas, being first duly sworn according to law, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed ? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source ? No

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account ? No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing ? No

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. - none

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury

Edward James Thomas
EDWARD JAMES THOMAS, Respondent

Subscribed and Sworn to Before me this 6th day of July, 1985 in the County of Union State of Florida.

C. E. Crews
NOTARY PUBLIC
Notary Public, State of Florida
My Commission Exp. on Feb. 6, 1987

IN THE
UNITED STATES DISTRICT COURT
OCALA DIV. 2016

CASE NO. 84-1870

LOUIS L. HEBERMEIER,
AND THE ATTORNEY GENERAL OF THE STATE
OF FLORIDA, JIM SMITH,
RESPONDENT

-/-

EDWARD EARL JAMES,
PETITIONER

RESPONDENT'S REPLY IN OPPOSITION TO PETITIONER'S APPLICATION
FOR CERTIORARI

EDWARD EARL JAMES
#041071
REGIONAL L-100-22
UNION CORRECTIONAL INSTITUTION
POST OFFICE BOX 221
RAIFORD, FLORIDA 32083

QUESTION PRESENTED

Whether the federal habeas corpus petition should have been dismissed without prejudice to allow a state prisoner to exhaust state remedies when the inmate's first state collateral attack had already been denied because of procedural default and under WAINWRIGHT V. SYKES, 433 U.S. 107, 125 n. 25 (1982), exhaustion would be futility because state law restricts subsequent collateral attacks ?

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OPINION BELOW

The per curiam opinion of the Eleventh circuit court of Appeals upon which petitioners attempts to envoke jurisdiction of this court to review is unreported, and shown at Appendix "A - 27", of petitioners application for writ of certiorari,which Respondent adopts and incorporates herein by refererce. The opinion affirmed an unpublished order of the United States District Court of the Middle District of Florida which dismissed Respondent's petitions for writ of Habeas corpus, and is shown at petitioners Appendix "A -23 thru 25" said. Respondent adopts and incooporates herein by reference.

GROUNDS JURISDICTIONAL SENTENCE

This court has jurisdiction to duty petitioners' application for certiorari pursuant to, and under the authority of rule 17 of the United States Supreme Court rules.

STATUTORY PROVISION INVOLVED

Section 28 U. S. C. 2254; and 28 U.S.C. 2243 provide in pertinent part:

...the court shall...determine the facts, and dispose of the matter as law and justice require.

OBJECTION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

COMES NOW, EDWARD JAMES THOMAS, Respondent in the cause, and enters this his Objection to Petitioner's application for Writ of Certiorari.

Jurisdiction of this Court to entertain is invoked pursuant to Rule 22.3 of Rules of this Court.

The basis of this objection are that: (a) the decision of the Court below is not in conflict with another Court of appeals; of a decision of this Court; nor has it decided a Federal question in a way which conflict with a decision of Florida Supreme Court; nor does the Court below, by affirmation of the District Court's order and opinion which requires Respondent exhaust state remedies, depart from the accepted and usual course of Judicial Proceedings; nor does the Court below by it affirmation, in Thomas v. Florida, 84-5014, give rise to any question of is sufficient to invoke jurisdiction of this Honorable Court under the authority of 28 U. S. C. 1254 (1).

As such, Respondent object to Petitioner's application for Certiorari, and request that this Honorable Court deny same.

RESPECTFULLY SUBMITTED,

Edward James Thomas

OPPOSING STATEMENT OF THE CASE

On the 15th, day of January 1980, Respondent was charged by information with burglary, and grand theft under case number 80-23 CF in the circuit court of the fourth judicial circuit of Florida. On the same date another information was filed in said court charging Respondent with burglary and grand theft under case number 80 - 25 CF.

After trial by jury, Respondent was found guilty as charged in each count of the informations. Following adjudication of guilt, and imposition of sentence, an appeal was taken to Florida first District court of appeals. Both burglary judgments and two of the three grand theft judgments and sentences were affirmed by Florida's first District court of appeals; see TIMMS V. STATE, 405 so 2d 1015 (Fla. 1st D.C. 1981).

Subsequent thereto, Respondent filed motion for post conviction relief under rule 3.850 of Florida rules of criminal procedure in case number 80-23 CF. Respondent raised three claims for relief therein; to wit:

1. APPELLANT WAS DENIED THE RIGHT TO A FAIR AND IMPARTIAL TRIAL AND DENIED DUE PROCESS WHEN THE STATE FAILED TO ESTABLISH A PROPER CHAIN OF CUSTODY;

2. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY "STATE ACTION" WHERE THE COURT HAD EXTRANEOUS COMMUNICATION WITH A WITNESS, AND COUNSEL MOVED FOR MISTRIAL.

3. Trial COURT ERRED IN REQUIRING APPELLANT TO PAY PURSUANT TO F. S. 960. 20, when APPELLANT WAS DECLARED INDIGENT.

During the pendency of the aforesaid motion, Respondent filed post conviction motion in case number 80 - 23 CF, in the trial court, under 3.850 of Florida rules of criminal procedure. The issue/grounds

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The petitioners assert that this case present an opportunity for the Court to clarify what it meant in Engle v. Isaac, 456 U.S. 107, 125 n. 28 (1982), when it explained that there was a difference between the procedural default doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977) and the exhaustion doctrine of 28 U. S. C. 2254 (b). However, it is here contended that:

the differentiation between the procedural default of Wainwright v. Sykes, and the exhaustion doctrine of 28 U. S. C. 2254 (b) as discussed in Engle, Supra, needs no clarification because the distintion is quite apparent*. What petitioners are in essence asking--under guise of clarification--is that this Honorable Court increase their swelling arsenal of procedural devises; in that equip them with another procedural rule/tool to thwart the convicted prisoner efforts to obtain meaningful review of his Federal Claims. A purpose for which neither Wainwright, Supra, nor 2254 (b) was intended, but has been so employed by petitioners in the case at bar, in that:

in the District Court as well as the Court below, petitioners represented that Respondent has undergone procedural default on his Federal Claims, and urged application of the procedural default doctrine of Wainwright Supra. The District Court relying upon the misleading arguement, and an incomplete record provided by petitioners, in conjunction with the state trial court's summary denials which was based upon a theory that the grounds presented could have been or should have been raised on direct appeal dismissed Respondent's Federal Claims in case number 83-1156-

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* Wainwright v. Sykes, Supra, mandates that where a state procedural rule require a contemporaneous objection on a specific matter either before or during trial, if the litigant fails to comply therewith, he or she will not be heard to complain at a subsequent stage of the judicial process absent a showing of cause and prejudice. On the other hand:

28 U. S. C. 2254(b) mandates that a state prisoner exhaust all available state remedies before resorting to Federal Court for vindication of Federal Constitutional rights.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply in Opposition to Application for Writ of Certiorari has been forwarded to Lawrence A. Kadec, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 via U.S. Mail this 23 day of June 1985.

Edward James Thomas
EDWARD JAMES THOMAS, FOR COUNSEL

John Resnick
June 23, 1985

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires